UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WYNN LAS VEGAS, LLC	
and	
KELI P. MAY, an Individual	**Case No. 28-CA-155984**
and	
KANIE KASTROLL, an Individual	**Case No. 28-CA-157203**
_____/	

RESPONDENT WYNN LAS VEGAS, LLC'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

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I. STATEMENT OF THE CASE.

This case presented a relatively straightforward scenario involving the discipline of Table Games Dealer Kanie Kastroll and Security Officer Keli May – two current employees of Wynn Las Vegas, LLC (hereinafter "Wynn" or "Respondent"). This case further required the Administrative Law Judge to determine the lawfulness of a number of provisions from Wynn's Code of Personal Conduct, which have been parsed and excerpted by the General Counsel in the Consolidated Amended Complaint.

On or about December 1, 2015, an order issued consolidating the Charge filed by Ms. Kastroll against Wynn (Case No. 28-CA-157203), with the Charge filed by Officer May against Wynn (Case No. 28-CA-155984). The Consolidated Amended Complaint essentially alleged that Wynn violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (hereinafter "the Act") by issuing certain discipline to Ms. Kastroll and Officer May and by maintaining certain policies within its Code of Personal Conduct.

A hearing was held before Associate Chief Judge Gerald M. Etchingham ("the Judge") in Las Vegas, Nevada, from February 16, 2016 through February 18, 2016. Three volumes of transcript containing the testimony presented during the hearing were prepared and transmitted to the parties on or about February 25, 2016. The Consolidated Amended Complaint was amended during the hearing to withdraw Paragraph 5(e) of the Consolidated Amended Complaint and exclude the allegation that Wynn improperly surveilled its employees. Durkin, Vol. 2 at 312:5-8. The Consolidated Amended Complaint was further amended to include an allegation that Wynn interrogated employees regarding their union activities in violation of Section 8(a)(1) of the Act. Durkin, Vol. 2 at 312:9-25; 317:21-25; 318:1; Etchingham, Vol. 2 at 318:7-25; 319:1-12.

Gregory J. Kamer, Esq. and R. Todd Creer, Esq. of the law firm of Kamer Zucker Abbott represented Wynn. Julia M. Durkin, Esq. served as Counsel for the General Counsel of the

National Labor Relations Board ("the Board"). During the hearing, the General Counsel called the following individuals as witnesses: Kevin Tourek, Global Compliance Officer for Wynn Resorts Limited; Courtney Prescott, Employee Relations Manager for Wynn; Keli May, a Wynn Security Officer; Donna Blair, a Wynn Table Games Dealer; Kanie Kastroll, a Wynn Table Games Dealer; Rick Rankin, a Wynn Security Officer; Kelly Dudoit, Wynn's Assistant Director of Security; and Brian Parker, Wynn's Security Department Human Resources Manager. Respondent called the following witnesses: Roxanne Boguille, former Wynn Security Department Administrator; Johnny Moreno, a Wynn Security Officer; and Gabriela Marquez, a Wynn Senior Employee Relations Counselor.

In his Decision dated September 26, 2016, the Judge held that Respondent acted lawfully in issuing Ms. Kastroll a first written warning for engaging in a lengthy, one-sided discourse soliciting Security Officer Johnny Moreno to vote "yes" in a then upcoming union representation election while Officer Moreno was actively on work time. ALJD: 23:34-42. Judge Etchingham also held that Wynn did not engage in any unlawful surveillance or interrogation. ALJD: 28:28-35; 30:31-40.

With respect to the suspension and second written warning issued to Officer May, Judge Etchingham found that Wynn violated the Act by disciplining her following her lengthy, loud, and profane outburst in Wynn's Security Department, during which she yelled that her managers "are fucking idiots," no one "knows shit," and that an employee in Wynn's Payroll Department is a "a fucking idiot as well." ALJD: 33:10-11. While Officer May was apparently frustrated about a payroll mistake, Wynn maintains that the payroll mistake was personal and singular to Officer May, was not brought to Respondent's attention on behalf of Officer May's coworkers, and did not warrant her profane outburst. Indeed, the security officer called by the General Counsel to corroborate Officer May's allegations specifically denied encouraging Officer May to

take any action. Further, even if Officer May's conduct was protected under the Act as concerted activity, she lost that protection by her use of egregious profanity, her disruption of the work environment, and the fact that her outburst was not "provoked" by management. Accordingly, Wynn acted appropriately in issuing Officer May a second written warning for inappropriate and unprofessional conduct.

Finally, despite General Counsel improperly parsing of the Code of Conduct rules' plain language to provide certain phrases in isolation in the Consolidated Amended Complaint, Judge Etchingham found some of the policies to be lawful, but held that the following policies violated the Act: the Inappropriate Conduct Rule, the No Photographs, PDAs, Messaging, Calls, or Recordings Rule, the Restricted Access Rule, and the Restricted Intellectual Property Rule. However, the policy provisions parsed and excerpted from Wynn's Code of Personal Conduct are lawful under the Act as they do not explicitly restrict protected, concerted activity, cannot be reasonably construed to prohibit protected, concerted activity, were not promulgated in response to union activity, and are not applied in a manner that restricts employees from engaging in activity protected by Section 7 of the Act. Wynn's work rules should be given a fair reading in their actual context and upheld as lawful.

References in the brief are to the party testifying, the transcript volume, the page of testimony in the transcript, and the relevant transcript lines referenced (*e.g.*, Rankin, Vol. 3 at 452:20-21, 25; 453:1). There are also references to Respondent's Exhibits (R. Ex.), General Counsel's Exhibits (GC Ex.), and Administrative Law Judge Etchingham's Decision ("ALJD").

II. WYNN'S CROSS-EXCEPTIONS.

On November 28, 2016, under separate cover, Wynn filed 50 numbered cross-exceptions to the Judge's Decision pursuant to Section 102.46 of the Board's Rules and Regulations. All of

Wynn's cross-exceptions pertain to the Judge's findings and determinations on the allegations specifically involving Officer May and four (4) of Wynn's policies.

III. FACTS AND ARGUMENT IN SUPPORT OF CROSS-EXCEPTIONS.

A. The Judge Erred in Concluding May and Other Officers Had a Long Standing Issue with Payroll Errors (Exceptions #1, 5, & 30).

Wynn hired Charging Party Keli May ("Officer May") on April 11, 2005 and currently employs her as a security officer in Wynn's Security Department. May, Vol. 2 at 320:14-16, 19-20. As a security officer, Officer May is responsible for monitoring and patrolling her assigned area to ensure guest and employee safety, minimizing potential for loss or damages, and responding to emergency situations. May, Vol. 2 at 340:15-24. During the relevant time period, Officer May was assigned to guard the Wynn Design and Development ("WDD") Flex Building located on Koval Lane and Sands Avenue. May, Vol. 2 at 333:23-25; 334:1-8, 25; 335:1.

The WDD Flex Building is a satellite office that does not have a time clock for officers to clock in and out for their shifts. May, Vol. 2 at 338:24-25; 339:1-10; 342:22-25; 343:1. Instead, since it would be impractical for Officer May or any other officer assigned to the WDD Flex Building to clock in at the Wynn main building and then travel approximately five (5) to fifteen (15) minutes to the WDD Flex Building, Officer May and all other officers assigned to the WDD Flex Building call the manager on duty over the radio and inform him or her of their arrival and their departure. Notably, Officer May falsely testified denying that she would call management to clock in and out and rather claimed that her hours were not tracked. May, Vol. 2 at 352:11-23; 415:17-21; 416:1-7. Such a claim is senseless and misleading. Even, fellow security officer, Rick Rankin, who has also been assigned to the WDD Flex Building, testified that officers report their in and out times to management over a two-way radio. Rankin, Vol. 3 at 468:7-24; 448:2-9. Officer May's meritless testimony led the Judge to a finding that Wynn's method of tracking hours for officers stationed at the WDD Flex Building was "arcane and unreliable." ALJD:

34:35-37. To the extent that Judge Etchingham relied on Officer May's false testimony for Wynn's timekeeping method, he significantly erred in determining that payroll errors, such as May's error, were rampant throughout the department.

B. The Judge Erred in Concluding That Officer May's Outburst Was Protected (Exceptions #9, 16, 17, 18, 23, & 24).

Unfortunately, the timekeeping procedure utilized at the WDD Flex Building led to a payroll error with Officer May in which her hours were not properly recorded. Specifically, Officer May discovered in June 2015 that she was owed several hours of overtime and double time for her time worked over the Memorial Day weekend. An investigation into Officer May's payroll issue later concluded that Officer May's work time was not entered correctly and that Officer May was issued a check on May 29, 2015 that mistakenly did not compensate her for eight (8) hours of overtime and two (2) hours of double time. May, Vol. 2 at 355:2-5. The check was $291.52 short of what was owed. GC Ex. 31.

When the mistake first came to her attention, Officer May informed Assistant Manager of Security Corey Prowell of the shortage who said he would take care of it. May, Vol. 2 at 357:4-6; 359:19-21; 360:22. The following day, Officer May met with Security Supervisor Tamara Howell because she believed the information she provided to Assistant Manager Prowell may have been misleading and she wanted to make sure the correct information was submitted. May, Vol. 2 at 361:13-22; 362:17-24; 370:1-10. On June 12, 2015, Wynn issued a payroll check to Officer May that resolved only part of her payroll issue because the Assistant Manager mistakenly submitted a request to the Payroll Department to compensate Officer May for eight (8) hours of *regular* pay. May, Vol. 2 at 364:23-25; 365:1-11.

After being compensated for eight (8) straight-time hours, Officer May was still approximately $91.00 short of what she was owed. May, Vol. 2 at 365:10-11; 388:20-25; GC Ex. 31. Accordingly, on June 16, 2015, Officer May approached Security Supervisor Howell to

inform her that she was still owed money and asked for her assistance. May, Vol. 2 at 366:23; 369:12-17; 370:11-15. Over the next couple days, Supervisor Howell spoke with Wynn's Payroll Department and security managers to resolve Officer May's payroll issue. May, Vol. 2 at 371:2-4; Dudoit, Vol. 3 at 479:16-19. Specifically, Supervisor Howell spoke with Assistant Director Kelly Dudoit who agreed to send an e-mail and a pay rate adjustment request to correct the error prior to the next payroll period. Dudoit, Vol. 3 at 479:16-22. Ultimately, the amount of $91.10 owed to Officer May was directly deposited into her account on June 19, 2015. May, Vol. 2 at 418:12-17; 419:7-9; GC Ex. 31.

On June 19, 2015, Officer May – assumingly unaware that the money owed to her had already been deposited into her account – reported to the Wynn security office to speak with Assistant Director Dudoit. May, Vol. 2 at 377:1-13. When Officer May entered the security office, the managers and supervisors were starting a management meeting in Shift Manager Alfonso Romo's office and did not immediately speak to her. May, Vol. 2 at 378:5-7, 14-20. Officer May chose to wait in the security office for the managers to finish their meeting. May, Vol. 2 at 380:20-22.

While Officer May was waiting near the copy machine, Officer Rick Rankin entered the security office. May, Vol. 2 at 380:22-23; Rankin, Vol. 3 at 440:9-10. Officer Rankin had no idea that Officer May was in the security office and neither one had planned to meet the other there. May, Vol. 2 at 422:24-25; 423:1-4. Officer Rankin asked Officer May why she was in the security office and she explained that she was there to speak with someone about her payroll issue. May, Vol. 2 at 381:22-23. Officer May then launched into a loud and lengthy ten (10) to twelve (12) minute long diatribe pertaining to *her personal* payroll issue. Rankin, Vol. 3 at 453:10; May, Vol. 2 at 421:19-21; 424:7-9. Not only was Officer May's outburst long in duration, it was also riddled with profanities. May, Vol. 2 at 420:19-25 (Officer May admits to a

"colorful worded conversation" and using profanity); see also GC Ex. 28; May, Vol. 2 at 382:3-4 (Officer May states that she told Officer Rankin she had "already gone to four fucking people"); 390:12-15; 420:24-25 (Officer May admits to referring to people as "fucking idiots"); 421:17-18 (Officer May admits that she said that no one "knows shit."); Parker, Vol. 3 at 518:22-23 (HR Manager Bryan Parker heard Officer May state, "managers were fucking idiots"); Boguille, Vol. 3 at 524:22-24 (then-Security Administrator/Assistant to the Director of Security Roxanna Boguille heard Officer May state that management are "all fucking idiots" multiple times); Boguille, Vol. 3 at 526:11-12 (Administrator Boguille heard Officer May yell, "The girl's a fucking idiot as well.").

During Officer May's outburst, then-Security Administrator/Assistant to the Director of Security Roxanna Boguille, and then-Corporate Investigator Brad Thomison were also present in the security office trying to complete job tasks. May, Vol. 2 at 386:25; 387:1-4; 426:17-20. For example, Administrator Boguille testified that she was interrupted by Officer May's yelling while she was in the middle of a telephone call with a customer. See Boguille, Vol. 3 at 525:14-17; 532:15-22 ("I was dealing with a guest on the phone and...If you're on the phone with someone, you can hear background. I don't want the caller to hear 'fucking' coming out or 'idiots' or anything like that."). Additionally, new Security Human Resources Manager Brian Parker could hear the outburst outside of the closed double-doors leading into the security office suite. Parker, Vol. 3 at 504:1-9; 509:1-14; 513:6-15; R. Ex. 6.

The outburst by Officer May does not constitute protected, concerted activity. The Board has long established that although employees are permitted some leeway for impulsive behavior when engaged in protected activity, such leeway must be balanced against "an employer's right to maintain order and respect." Piper Realty, 313 N.L.R.B. 1289, 1290 (1994). Thus, if an employee engages in abusive or indefensible misconduct during activity that would otherwise be

protected, the employee forfeits the Act's protection. DaimlerChrysler Corp., 344 N.L.R.B. 1324, 1329 (2005); see also Media General Operations, Inc. v. NLRB, 394 F.3d 207 (4th Cir. 2005) (holding that the employee's comments calling supervisor a "racist" and "redneck son-of-a-bitch" merely represented his own personal sentiments and were not representative of union opinion; thus, his personal comments were not protected).

To that end, the Board in Atlantic Steel Co., 245 N.L.R.B. 814 (1979), set forth a four-factor test to determine whether an employee loses the protection of the Act, which includes: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees' outburst; and (4) whether the outburst was provoked by the employer's unfair labor practices. Id. at 816. In Atlantic Steel Co., the Board upheld an arbitrator's decision that an employee's outburst was not protected by the Act because it occurred on the production floor during working time, that the employee's question about overtime expressed legitimate concern which could be grieved, and that the supervisor had investigated and answered his question; but, nevertheless, the employee had reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated. Atlantic Steel Co., 245 NLRB 814, 816–17 (1979).

Despite the foregoing standard, the Judge disregarded the applicable four factor test and instead relied on the totality of the circumstances test from Richmond District Neighborhood Center, 361 NLRB No. 74 (2015). ALJD: 34:16-24. In Richmond, two employees were not re-hired to their positions at a summer camp after they engaged in a conversation on Facebook consisting of, among other things, numerous detailed descriptions of specific insubordinate acts. Richmond District Neighborhood Center, 361 NLRB No. 74 (2015). The Board held that the Facebook conversation constituted conduct objectively so egregious as to lose the Act's

protection. The Judge created a totality of the circumstances test based on Richmond consisting of the following factors: (1) whether the record contained any evidence of Wynn's anti-union hostility; (2) whether Wynn provoked Officer May's conduct; (3) whether Officer May's conduct was impulsive or deliberate; (4) the location of Officer May's outburst; (5) the subject matter of the outburst; (6) the nature of the outburst; (7) whether Wynn considered the language used by Officer May to be offensive; (8) whether Wynn maintained a specific rule prohibiting the language at issue; (9) whether the discipline imposed on Officer May was typical of that imposed for similar violations. ALJD: 34:16-26.

The Judge's concocted test does not properly analyze the situation at issue and should be disregarded in favor of the established Atlantic Steel Co. test because the facts presented in this case are much more similar to the facts in Atlantic Steel Co. Specifically, although Officer May was on paid break, her outburst took place on property, in the security office, and in the presence of other employees. Additionally, like in Atlantic Steel Co., Officer May was present in the office to discuss issues with management, rather than the Facebook conversation in Richmond, which presumably was never intended to come to management's attention. Finally, Facebook is a public platform, which is distinctly different from the Employer's property and work area. For the foregoing reasons, the Judge erred in disregarding the four factor test in Atlantic Steel Co. in favor of his own developed totality of the circumstances test.

Notably, even using the Judge's created test, Officer May's outburst was not protected by the Act due to the location in the security office, the personal nature of the work issue experienced by Officer May, and the intolerable and obscene nature of the outburst that was not provoked by management. "[A] contrary result in this case would mean that any employee's offhand complaint would be protected activity which would shield any obscene insubordination

short of physical violence. That result would not be consistent with the Act." Atlantic Steel Co., 245 NLRB at 817.

1. Officer Rankin's Presence in the Security Office Did Not Transform Officer May's Outburst into Concerted Activity. (Exceptions #10, 14, 19, & 20)

The Judge gave weight to the fact that Officer Rankin was present during Officer May's outburst and even insinuated that the two officers had planned to meet in the security office for lunch. Such a factual determination is incorrect and not supported by the evidence. The testimony clearly revealed that while Officer May was waiting near the copy machine in the security office, Officer Rick Rankin entered the security office. May, Vol. 2 at 380:22-23; Rankin, Vol. 3 at 440:9-10. However, Officer Rankin had no idea that Officer May was in the security office and neither had planned to meet the other. May, Vol. 2 at 422:24-25; 423:1-4. When Officer Rankin asked Officer May why she was in the security office, it was then that Officer May launched into her loud and lengthy ten (10) to twelve (12) minute long diatribe pertaining to *her personal* payroll issue. Rankin, Vol. 3 at 453:10; May, Vol. 2 at 421:19-21; 424:7-9. This conversation between Officers May and Rankin was not protected activity as Office Rankin did not encourage Officer May to take any group action. Rankin, Vol. 3 at 452:21-25; 453:1; See Mushroom Transp. Co. v NLRB, 330 F. 2d 683 (1964) (in order for a conversation to be concerted activity it must at the very least be engaged in with the object of initiating, inducing, or preparing for group action or have some relation to group action in the interest of the employees). Any determination as to Officer May's outburst being protected that relied on the assumption that Officer Rankin and Officer May had planned to meet in the security office to work in concert to address her payroll issue should be discredited.

2. *Officer May Was Not Acting on Behalf of Other Security Officers. (Exceptions #2, 3, 4, & 21).*

The subject of Officer May's outburst was not the product of group action, but rather constituted an individual gripe about a personal payroll mistake that Wynn was actively trying to correct on her behalf. In that regard, there was nothing concerted about Officer May's behavior. Indeed, as set forth by the Board in Meyers Industries, 268 N.L.R.B. 493, 497 (1984) (Meyers I):

> In general, to find an employee's activity to be "concerted", we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (*e.g.*, discharge) was motivated by the employees protected concerted activity.

And as recited in Meyers Industries, 281 N.L.R.B. 882, 887 (1986) (Meyers II):

> We reiterate, our definition of concerted activity in Meyers I encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

Although Officer May's self-serving testimony was replete with comments indicating that other security officers would come to her to discuss their payroll issues, none of those security officers provided any testimony or corroborated Officer May's assertions. May, Vol. 2 at 347:17-25; 348:1-25; 349:1-11. Further, the evidence offered by all of the other witnesses was devoid of any support for Officer May's contention. Specifically, the Judge curiously cited to page 461 in support of his determination that Officer Rankin worked with Officer May and payroll errors were common and would be discussed at lunch with other officers. ALJD: 16:26-34. However, Officer Rankin's testimony on page 461 entirely consists of his cross-examination pertaining to his assignment to Priority One Post. See Rankin, Vol. 3 at 461. General Counsel did not establish that Officer May's conduct was part of a group grievance, as claimed by the

Judge – Officer May's conduct was solely based on her own payroll issue. ALJD: 33:30-36; See Koch Supplies, Inc. v NLRB, 646 F. 2d 1257 (1981) (employee's complaints about not receiving a promotion that she neither intended or contemplated would benefit any employee other than herself, even if a matter of group concern, was not concerted – employee must have intended her activities to relate to group action in order for such activities to merit protection).

Not only was Officer May's purpose for being present in the security office not related to any payroll issue other than her own, Officer May never even claimed that she was acting on behalf of others or requested a change to the current timekeeping method. Officer May had ample opportunity to raise the issue on behalf of others during her numerous conversations with management, but she only raised her own payroll issue. In fact, after Officer May's outburst, Manager Romo and Supervisor Howell sat down with Officer May to discuss her payroll issue. May, Vol. 2 at 385:7; 11-15. During that meeting, Manager Romo advised Officer May that she was welcome to come to him in the future if she was experiencing issues and then he, Supervisor Howell, and Officer May worked together and calculated that Officer May was still owed compensation for one straight-time hour and two double-time hours. May, Vol. 2 at 389:12-14, 17-18. At no time throughout the entire process did Officer May ever indicate that she was raising her concern on behalf of her coworkers or request that the Company fix the timekeeping method in the WDD Flex building to prevent future issues. Dudoit, Vol. 3 at 496:11-13. It is undisputed that Officer May was only present in the security office to resolve her own personal payroll issue. May, Vol. 2 at 381:22-23.

Once again, there is no evidence that the incident in question involved any attempt by Officer May (or anyone else) to discuss or correct payroll mistakes experienced by other security officers. Even Officer Rankin denied ever directing Officer May to take any action. Rankin,

Vol. 3 at 452:21-25; 453:1. In reality, Officer May merely sought to gripe about and fix a personal payroll error she experienced and did so in a way that is not protected by the Act.

3. Even If Officer May's Outburst Was Concerted, She Lost the Protection Due to Her Egregious Use of Profanity Which is Not Tolerated at Wynn (Exceptions # 12, 13, 15, 22, & 31).

As discussed *supra*, not only was Officer May's outburst long in duration, it was also riddled with profanities. May, Vol. 2 at 420:19-25 (Officer May admits to a "colorful worded conversation" and using profanity); see also GC Ex. 28; May, Vol. 2 at 382:3-4 (Officer May states that she told Officer Rankin she had "already gone to four fucking people"); 390:12-15; 420:24-25 (Officer May admits to referring to people as "fucking idiots"); 421:17-18 (Officer May admits that she said that no one "knows shit."); Parker, Vol. 3 at 518:22-23 (Human Resources Manager Parker heard Officer May state, "managers were fucking idiots"); Boguille, Vol. 3 at 524:22-24 (Administrator Boguille heard Officer May state that management are "all fucking idiots" multiple times); Boguille, Vol. 3 at 526:11-12 (Administrator Boguille heard Officer May yell, "The girl's a fucking idiot as well.").

In their respective testimonies, Officer May and Officer Rankin contradicted one another as to the full content of their discussion. For example, Officer May testified that Officer Rankin directed, "get your fucking ass over there and demand your money right now" and demanded that she "go over to that fucking office and demand [her] fucking money." May, Vol. 2 at 382:2-3. In contrast, Officer Rankin testified that he said it was "bullshit," but specifically denied ever using the term "fuck" or ever encouraging Officer May to take any action as she described. Rankin, Vol. 3 at 452:20-21, 25; 453:1; 470:24-25. Additionally, while Officer May testified as to frequently hearing profanity used by other supervisors and managers, Officer Rankin made clear through his testimony that what is actually said was less severe than Officer May's

language during her lengthy outburst. See Rankin, Vol. 3 at 456:19-25; 457:1-25; 458:1025; 459:1-23.

Despite the conflicting testimony of an interested Charging Party and a disinterested witness, the Judge credited Officer May's testimony as to the outburst. ALJD: 23:4-9, 29-30. Such a determination is in error because the use of unnecessary and profane language in such a situation warrants loss of protection under the Act. Although employees are permitted some leeway for impulsive behavior when engaged in protected activity, such leeway must be balanced against "an employer's right to maintain order and respect." Piper Realty, 313 N.L.R.B. 1289, 1290 (1994). Thus, if an employee engages in abusive or indefensible misconduct during activity that would otherwise be protected, the employee forfeits the Act's protection. DaimlerChrysler Corp., 344 N.L.R.B. 1324, 1329 (2005); see also Media General Operations, Inc. v. NLRB, 394 F.3d 207 (4th Cir. 2005) (holding that the employee's comments calling supervisor a "racist" and "redneck son-of-a-bitch" merely represented his own personal sentiments and were not representative of union opinion; thus, his personal comments were not protected).

Interestingly, the Judge did credit Officer Rankin's testimony to the extent that Officer Rankin claimed that cursing was a common practice around the security office. ALJD: 23:13-16. Such a vague determination by the Judge was also an error. Officer May admitted that the language she used was offensive. May, Vol. 2 at 420:19-25 (Officer May admits to a "colorful worded conversation" and using profanity); see also GC Ex. 28; May, Vol. 2 at 382:3-4 (Officer May states that she told Officer Rankin she had "already gone to four fucking people"); 390:12-15; 420:24-25 (Officer May admits to referring to people as "fucking idiots"); 421:17-18 (Officer May admits that she said that no one "knows shit."). Even if officers and managers occasionally used profane language, such profanities have not been yelled in the manner done so

by Officer May. Boguille, Vol. 3 at 535:16-23. The Judge's belief that Officer May's conduct was protected because other officers occasionally use inappropriate language is incorrect.

Further, the Judge's finding that Wynn's Code of Conduct does not prohibit vulgar or profane language when it references "offensive language" and that other employees have not been disciplined for conduct similar to Officer May's conduct is without justification. ALJD: 35:12-16. The evidence presented by Wynn demonstrated that Wynn uniformly issues discipline for inappropriate workplace conduct when it is brought to its attention. See, e.g., R. Exs. 14-16. The Judge also seems to rely on the fact that Officer Rankin was not disciplined for the conversation with Officer May as proof that Wynn does not uniformly discipline for offensive language and behavior. ALJD: 35:24-25. However, the Judge's reasoning relies on the incorrect assumption that Officer Rankin used offensive language and further that Wynn was aware of Officer Rankin's profanities. As discussed *supra*, Officer Rankin denied using the word "fuck," and even if he had engaged in inappropriate language, no one present during the outburst actually heard Officer Rankin say anything at all. Rankin, Vol. 3 at 452:20-21, 25; 453:1; 470:24-25; Boguille, Vol. 3 at 526:23-25; 527:1-2; 531:22-24; Parker, Vol. 3 at 514:10-18. Without any knowledge of Officer Rankin engaging in inappropriate or offensive conduct, Wynn did not discipline him.

Officer May's conduct, on the other hand, was admitted and heard by several witnesses. See May, Vol. 2 at 420:19-25 (Officer May admits to a "colorful worded conversation" and using profanity); see also GC Ex. 28; May, Vol. 2 at 382:3-4 (Officer May states that she told Officer Rankin she had "already gone to four fucking people"); 390:12-15; 420:24-25 (Officer May admits to referring to people as "fucking idiots"); 421:17-18 (Officer May admits that she said that no one "knows shit."); Parker, Vol. 3 at 518:22-23 (Human Resources Manager Parker heard Officer May state, "Managers were fucking idiots"); Boguille, Vol. 3 at 524:22-24

(Administrator Boguille heard Officer May state that management are "all fucking idiots" multiple times); Boguille, Vol. 3 at 526:11-12 (Administrator Boguille heard Officer May yell, "The girl's a fucking idiot as well."). Officer May's use of offensive and abusive language was not protected and, therefore, Wynn did not violate the Act by issuing Officer May discipline.

4. Officer May's Outburst Disrupted Employees' Work Duties (Exceptions #7, 8, 10, 28, 29, & 40).

The Judge specifically stated in his decision that Officer May did not interfere with Wynn's work environment and noted that the security officers were "seemingly alone" in the security office when her rant occurred. ALJD: 34:39-43. However, the Judge appears to have disregarded the testimony of all of Wynn's witnesses and even some of Officer May's testimony stating that there were other employees working in the security office. Officer May admitted that during her outburst, then-Security Administrator/Assistant to the Director of Security Roxanna Boguille, and then-Corporate Investigator Brad Thomison were present in the security office trying to complete their respective job tasks. May, Vol. 2 at 386:25; 387:1-4; 426:17-20. Additionally, Administrator Boguille testified that she was interrupted by Officer May's yelling while she was in the middle of a telephone call with a customer. See Boguille, Vol. 3 at 525:14-17; 532:15-22 ("I was dealing with a guest on the phone and...If you're on the phone with someone, you can hear background. I don't want the caller to hear 'fucking' coming out or 'idiots' or anything like that."). Administrator Boguille was seated approximately 20-22 feet way from where Officer May was yelling. May, Vol. 2 at 382:25; 383:1; R. Ex. 6. In fact, Officer May's outburst was disruptive enough that Administrator Boguille abruptly ended her telephone conversation with the guest. Boguille, Vol. 3 at 525:14-17; 532:15-22. Additionally, new Security Human Resources Manager Brian Parker heard the outburst outside of the closed

double-doors leading into the security office suite causing him to walk into the office to investigate the commotion. Parker, Vol. 3 at 504:1-9; 509:1-14; 513:6-15; R. Ex. 6.

Administrator Boguille testified that after hanging up with the customer, she got up from her desk and asked Investigator Thomison if he knew what was happening and where the managers were. Boguille, Vol. 3 at 537:17-25; 538:1-2. Investigator Thomison told Administrator Boguille that all of the managers were in Manager Romo's office. Boguille, Vol. 3 at 538:3-6. Administrator Boguille then went to Manager Romo's office, knocked on the door, and entered. Boguille, Vol. 3 at 530:22-24. Administrator Boguille informed Manager Romo that Officer May was loudly cursing, complaining about her payroll issue, and calling management "fucking idiots." Boguille, Vol. 3 at 524:22-25; 525:4-5; 531:5-10. As a result of Officer May's inappropriate conduct, all employees in the security office were taken away from their job duties, including all managers who were in the middle of a meeting.

Officer May's lengthy, loud, and profane comments were highly inappropriate in the security office setting when she admittedly knew Administrator Boguille and Investigator Thomison were in the vicinity trying to accomplish their work. May, Vol. 2 at 387:1-4 (Officer May admits she knew Administrator Boguille and Investigator Thomison were in the office and could hear what she said). Officer May's conduct distracted other employees from performing their job duties inside the security office, interrupted a meeting between management, and caused Human Resources Manager Parker to investigate the occurrence upon arriving at the office. See Boguille, Vol. 3 at 525:15-15-17; 532:15-22. The Judge's finding that Officer May's conduct did not interfere with the duties of other employees is erroneous.

5. *May's Outburst Was Not Justified Because Management's Actions Did Not "Provoke" Officer May's Outburst (Exceptions #6, 25, 26, & 27).*

The Judge's finding that management provoked Officer May is wholly unsupported by the record. ALJD: 34:29-35. While Officer May testified that she was frustrated by the fact that she was not properly paid, all other evidence indicates that management and payroll worked diligently to fix her payroll error once it was brought to their attention. When Officer May informed Assistant Manager of Security Corey Prowell of the shortage on June 1, 2015, he immediately said that he would take care of it. May, Vol. 2 at 357:4-6; 359:19-21; 360:22. The following day, Officer May spoke with Security Supervisor Tamara Howell because she believed the information she provided to Assistant Manager Prowell may have been misleading and she wanted to make sure the correct information was submitted. May, Vol. 2 at 361:13-22; 362:17-24; 370:1-10. On June 12, 2015, Wynn issued a payroll check to Officer May that resolved only part of her payroll issue because the Assistant Manager mistakenly submitted a request to the Payroll Department to compensate Officer May for eight (8) hours of *regular* pay. May, Vol. 2 at 364:23-25; 365:1-11. This mistake was an attempt to timely fix Officer May's payroll issue, but was the result of a miscommunication between Officer May and Manager Prowell.

Accordingly, on June 16, 2015, Officer May informed Security Supervisor Howell that she was still short $91.00. May, Vol. 2 at 366:23; 369:12-17; 370:11-15. Over the next couple days, Supervisor Howell worked with Wynn's Payroll Department and security managers to resolve Officer May's payroll issue. Assistant Director Kelly Dudoit sent an e-mail and pay rate adjustment request to correct the error prior to the next payroll period. May, Vol. 2 at 371:2-4; Dudoit, Vol. 3 at 479:16-22. Ultimately, the amount of $91.10 owed to Officer May was directly deposited into her account on June 19, 2015, just three days after this shortage was brought to management's attention. May, Vol. 2 at 418:12-17; 419:7-9; GC Ex. 31.

Although the payroll error was an unfortunate mistake, after May reported the issue on June 1, 2015, a check was issued on June 12, 2015. The initial check was an incorrect amount due to a miscommunication issue between management and Officer May, it was not a deliberate effort on the part of management to "frustrate" Officer May. It was not until Officer May complained on June 16, 2015 that management became aware of the payroll correction mistake. Once aware, May was issued another check on June 19, 2015 compensating her for the total amount. Management's collective effort to compensate Officer May immediately shows diligence, not "disinterested and unsuccessful efforts" as the Judge claims. ALJD: 34:36-41.

C. The Judge Erred in Concluding That Respondent Violated the Act by Issuing Discipline to Officer May (Exceptions #32, 33, 34, 38, 39, & 49).

Human Resources Manager Parker is responsible for overseeing disciplines, suspensions, and investigations in the Security Department. Parker, Vol. 3 at 503:3-6. Accordingly, then-Security Department Director Karen Hughes asked Human Resources Manager Parker to investigate Officer May's behavior. Parker, Vol. 3 at 504:15-22. Human Resources Manager Parker investigated Officer May's outburst by speaking with the Payroll Clerk, Nicole Saito, reviewing all of the transactions, and seeking statements from witnesses. May, Vol. 2 at 393:6-15; 395:12-19; GC Exs. 28, 31. On June 22, 2015, Human Resources Manager Parker specifically spoke with Officer May about the incident and informed her that she was being suspended pending investigation. Parker, Vol. 3 at 505:4-6; May, Vol. 2 at 396:7-8; GC Ex. Ex. 29. After a five (5) day suspension, Officer May was brought back to work on June 26, 2015. May, Vol. 2 at 399:20-22; 403:17-21; 404:5-10. Officer May's discipline was also reduced to a second written warning for inappropriate conduct in violation of Wynn's Code of Conduct. May, Vol. 2 at 405:1-2; GC Ex. 30.

Notwithstanding the Judge's determination that Wynn interfered with Officer May's

protected, concerted activities, Wynn's actions did not violate the Act, but were based on legitimate, nondiscriminatory business reasons. It is well-established that the Board applies the burden-shifting framework first adopted in Wright Line, 251 N.L.R.B. 1083, 1089 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), and later endorsed by the Supreme Court in NLRB v. Transportation Management, 462 U.S. 393, 401-03 (1983), to determine whether an employer violated the Act by disciplining an employee. See NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 267 (9th Cir. 1995). According to the Wright Line burden shifting framework, to sustain an unfair labor practice charge, the General Counsel has the burden of proving a *prima facie* case by showing that the employee's alleged protected activity was a "substantial or motivating factor" in the decision to discipline her. Mike Yurosek & Son, Inc., 53 F.3d at 267 (quoting NLRB v. Howard Elec. Co., 873 F.2d 1287, 1290 (9th Cir. 1989)).

The elements required to support a showing of discriminatory motivation are: (1) protected, concerted activity, (2) employer knowledge, (3) timing, and (4) employer animus. The General Counsel must prove not only that the employer knew of the employee's protected, concerted activities, but also that the timing of the alleged reprisal was proximate to the protected activities and that there was animus to link the factors of timing and knowledge to the improper motivation. See New York University Medical Center, 324 N.L.R.B. 887, 900 (1997) (citing Hall Construction v. NLRB, 941 F.2d 684 (8th Cir. 1991) and Service Employees Local 434-B, 316 N.L.R.B. 1059 (1995)); see also United Federation of Teachers Welfare Fund, 322 N.L.R.B. 385, 392 (1996) (stating that General Counsel is required to prove the timing of the alleged reprisal was proximate to protected activities). If such unlawful motivation is shown, the burden of persuasion shifts to the employer to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. See Excel Corporation, 324 N.L.R.B. 416, 420 (1997); New York University Medical Center, 324

N.L.R.B. at 900. Nevertheless, the ultimate burden of proof always remains with the General Counsel throughout the proceedings and does not shift to the respondent. The New Otani Hotel and Garden, 325 N.L.R.B. 928, 938 (1998).

In this case, the General Counsel did not establish a *prima facie* case to support a showing of discriminatory motivation, namely protected activity. Indeed, the evidence presented to the Judge failed to suggest, let alone demonstrate, that Officer May's conduct was protected or concerted in any fashion. Rather, Officer May, Officer Rankin, and others provided clear testimony admitting that Officer May engaged in a profanity-laced tirade in the security office and that her rant pertained only to her own personal payroll issue and was not raised on behalf of any other security officers. The outburst was in violation of Wynn's Code of Personal Conduct as it constituted inappropriate behavior in the workplace. Consequently, Wynn lawfully issued Officer May a second written warning for legitimate business reasons and violation of its policies – not for her involvement in any protected, concerted activity.

D. The Judge Erred in Finding That the Inappropriate Conduct Rule is in Violation of the Act (Exceptions #35, 36, 37, 41, 42, & 50).

The District of Columbia Circuit Court explained in its decision in Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB, 253 F.3d 19, 25 (D.C. Cir. 2001), that employers have a legitimate right to establish a "civil and decent workplace." As a luxury, Five-Star casino-resort, Wynn reasonably expects employees to operate with the appropriate business decorum while in the workplace. Consequently, Wynn maintains policies that require employees to display appropriate behavior at work, to refrain from "misconduct" on or off-duty that materially and adversely affects job performance or tends to bring discredit to the Wynn, to refrain from inappropriate conduct or horseplay, to be courteous to guests and employees, and to create a positive work environment by respecting, helping, and encouraging coworkers (potential

protected, concerted activity in and of itself).

While the Judge agreed with Wynn stating none of the policies discussed *infra* expressly prohibit Section 7 activity, the Judge held that the Inappropriate Conduct Rule could be construed as to limit communications concerning employment, "bar employees ... from discussing supervisory and managerial decisions, thereby chilling them from engaging in protected activities," and prohibiting negative speech. ALJD: 37:29-40; 38:1-10. Wynn disagrees. The policies cannot be reasonably read as anything other than the "positive, aspirational language" of behavior that should prevail at a Five-Star casino-resort. See Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164 (2012) (implying that a work rule that simply provides "[c]ourtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees" would be lawful); Marquez, Vol. 3 at 589:24-25; 590:1-4. This is especially true where, as here, the questioned provisions have been taken out of their full context since they fall among policies that specifically clarify the types of misconduct that are unacceptable in the workplace (*e.g.*, unlawful harassment and discrimination, hustling tips, workplace violence, and invasion of guest privacy). See R. Ex. 7 at 1-2; see also Marquez, Vol. 3 at 590:9-13 (providing example of a valet attendant who is convicted of a DUI being engaged in off-duty misconduct that could affect his job performance). As the Inappropriate Conduct Rule does not contain prohibitions on employee communications or conduct that would reasonably apply to protected, concerted activity, the focus of the Judge's determination is misplaced.

E. The Judge Erred in Finding That the No Photographs, PDAs, Messaging, Calls, or Recordings Rule Is In Violation of The Act (Exceptions #43, 44 & 50).

The Judge also found that the No Photographs, PDAs, Messaging, Calls, or Recordings Rule violated Section 8(a)(1) of the Act and is not tailored to a legitimate business interest.

ALJD: 40:6-7. However, making recordings in the workplace in and of itself is not a protected right. It is subject to an employer's right to make lawful rules regulating employee conduct in the workplace. Wynn's No Photographs, PDAs, Messaging, Calls, or Recordings Rule does not prohibit employees from engaging in protected, concerted activity, including speaking about their wages and terms and conditions of employment. There is no evidence or allegation that any of Wynn's rules have been applied to restrict the exercise of Section 7 rights. Instead, these rules are based on the legitimate business concerns of Wynn, including but not limited to protecting the privacy of its guests, ensuring security, protecting the confidentiality of proprietary business information and trade secrets, maintaining a work environment free from harassment and discrimination, avoiding unnecessary distractions during work time and in work areas, and fostering open lines of communications among employees and between employees and supervisors.

In addition to the noteworthy and valid business justifications underlying the rules set forth above, a number of specific limitations and business concerns also undergird and make each of the provisions in question lawful. In particular, the first provision in question speaks to not taking photographs in the "front-of-house" areas. Casinos are a highly regulated industry where large numbers of cash transactions take place each and every day. Prohibiting photographs in the front-of-house areas provides needed security to Wynn by preventing certain tools that would assist in certain crimes such as theft. For example, prohibiting photography in the front-of-house area thwarts the ability to share the location and rotation of security guards and how money and chips are stored and transported to other areas of the casino, thus helping to prevent criminal planning based on the same.

With regard to the second set of provisions under this Rule, the limitations incorporated within the express language of the rules makes such rules lawful. Specifically, the first rule

contains the limitation "while on duty," while the second rule provides the broad exception "Except for off-duty." These limitations acknowledge and incorporate perhaps one of the most recognized principles in labor law – "working time is for work." Republic Aviation, 324 U.S. at 803 and n.10 (quoting Peyton Packing Co., 49 N.L.R.B. at 843). Wynn has every right to ensure that employees are working – not taking personal recordings or engaging in personal conversations on their cell phones – when employees are on work time. That concept is further clarified in the last rule in question, which expressly allows employees to make recordings and take photographs when the subject of the same provides consent. Accordingly, these two provisions should be found lawful.

Finally, with respect to the last provision set forth above, the rule is not a wholesale ban on the use of recording devices in the workplace. Instead, the rule helps to ensure the privacy of other employees, guests, and vendors by requiring employees to obtain the permission of the desired subject of a photograph or recording before taking the photograph or recording. For example, the rule would prohibit the unauthorized or unconsented to picture taking of celebrity guests for personal use or gratification. The rule further helps to ensure compliance with state laws, which require in certain cases consent of at least one or both parties to certain recordings. See, e.g., NRS 200.620; NRS 200.650; Lane v. Allstate Ins. Co., 114 Nev. 1176, 969 P.2d 938 (Nev. 1998). Generally in Nevada, a party may not surreptitiously record an in-person conversation without the consent of at least one party, while the recording of telephone conversations requires both parties to consent to the recording. Id.

In view of the foregoing, the provisions in question are distinguishable from Whole Foods Market, Inc., 363 N.L.R.B. No. 87 (2015), and Caesars Entertainment, 362 N.L.R.B. No. 190 (2015), and should be found lawful. Indeed, the rules should be given their reasonable reading with respect to their express language, the realities of the workplace, and the actual

context in which rules are imposed. Doing so, makes the conclusion clear that said rules do not chill the exercise of Section 7 rights by employees are lawful under the Act and they are tailored to legitimate business interests.

F. The Judge Erred in Finding That the Restricted Access Rule is in Violation of the Act (Exceptions #45, 46 & 50).

In his Decision, the Judge held that the Restricted Access Rule is overbroad, specifically as it pertains to employees who are coming on duty and coming off duty. ALJD: 41:16-17. However, this access-related policy does not in any way, expressly or implicitly, impinge upon the Section 7 rights of employees. Unlike the *off-duty* access policies often analyzed under Tri-County Medical Center, Inc., 222 N.L.R.B. 1089 (1976), and upon which the Judge relied, the work rule challenged by the General Counsel sets forth reasonable expectations for *on-duty* employees in order to ensure the proper ingress to and egress from Respondent's facilities and designated parking lots. Indeed, the policy does not speak at all to the presence of off-duty employees within certain areas of Wynn, but merely regulates where on-duty employees should work and park and prevents foot traffic issues by assigning areas from which employees are to enter and exit the employee areas.

Wynn employs approximately 12,000 employees. As part of their work assignments, most employees are assigned to one of two properties operated by Respondent – Encore or Wynn – hence, the rule's distinction between the facilities and back of the house areas to which the employee is "scheduled to work." Marquez, Vol. 3 at 593:10-14. Moreover, for the convenience of guests and employees, Wynn provides guest parking garages and employee parking garages. Marquez, Vol. 3 at 593:15-25; 594:1-4. Employees must naturally utilize the employee parking garages rather than guest garages. Parking is assigned to employees based on where their uniform room is located or where they are considered to be employed. Marquez, Vol. 3 at

593:15-25; 594:1-4; R. Ex. 9. Given the number of employees Wynn employs and the limited parking, Wynn properly assigns parking areas to its employees to ensure that all staff members have somewhere to park. Consequently, the identified provisions do not facially or otherwise impede upon the exercise of Section 7 rights by Wynn's employees. This policy is not overbroad and does not run afoul of the Act.

G. The Judge Erred in Finding That the Restricted Intellectual Property Rule is in Violation of the Act (Exceptions #47, 48 & 50).

The Judge determined that Wynn's Restricted Intellectual Property Rule could chill employees from using Wynn's logo while engaged in Section 7 activities and thus violates the Act. ALJD: 42:5-8. However, when read in its entirely, the Restricted Intellectual Property Rule clearly reads as a protection for Wynn's legitimate interest in its branding, as well as a legally-protected property interest in the use of its logos under trademark law. This purpose is completely unrelated to labor disputes, union organizing, or other Section 7 activity. Notably, the provision identified by the Board's request has been extracted from the broader provision, which provides the appropriate context for the analysis of the rule. Specifically, the Code of Personal Conduct expressly requires compliance with "copyright, patent, and trademark laws, which are intended to protect the exclusive use of publications, productions, artistic works, and so forth." Thus, the provisions in question merely put employees on notice of Wynn's intent to protect its intellectual property within the confines of applicable copyright, patent, and trademark laws, and say nothing about employees' potential Section 7 activities. The Judge erred in determining that the Restricted Intellectual Property Rule violates the Act.

IV. CONCLUSION.

For the aforementioned reasons, the Judge erred in the above-mentioned determinations that Respondent violated the Act. Accordingly, Wynn respectfully requests that the Board

modify the Judge's Decision and Recommended Order to correct the aforementioned errors.

DATED this 28th day of November, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016, I did serve a copy of the foregoing **RESPONDENT WYNN LAS VEGAS, LLC'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER** upon:

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Office of the Executive Secretary National Labor Relations Board 1099 14th Street, NW Washington, D.C. 20570	**VIA ELECTRONIC FILING**
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An employee of Kamer Zucker Abbott